

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

JUL 10 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

)
)
Policies and Rules Regarding)
Minority and Female Ownership of)
Mass Media Facilities)

MM Docket No. 94-149

MM Docket No. 91-140

REPLY COMMENTS OF
AMERICAN WOMEN IN RADIO AND TELEVISION, INC.

DOCKET FILE COPY ORIGINAL

American Women in Radio and Television, Inc. ("AWRT") hereby files its reply comments in the above-referenced dockets. AWRT filed extensive comments on the Commission's Notice of Proposed Rulemaking (the "Notice") in support of the initiatives proposed to increase female ownership of mass media facilities. The Commission extended the reply comment period to evaluate the impact of the U.S. Supreme Court's decision in *Adarand Constructors, Inc. v. Pena*.¹ While the *Adarand* decision is relevant to the initiatives proposed by the Commission in the Notice, the Supreme Court's decision is not "fatal" to those initiatives.²

AWRT urges the Commission to pursue the sound and constitutional policies of providing incentives for female ownership of mass media facilities. Commission policies to promote female ownership of licensed facilities will withstand

¹ 1995 U.S.LEXIS 4037 (June 12, 1995).

² *Id.* at *67 (dispelling notion that strict scrutiny is fatal in fact to race-based action).

No. of Copies rec'd
List A B C D E

029

constitutional challenges on two grounds. *First*, the *Adarand* decision does not apply to gender-based policies and consequently does not apply to the policies and rules regarding female ownership proposed by the Commission in the Notice. *Second*, the Commission can develop the record to support its proposed initiatives under the more stringent standard of review of strict scrutiny.

I. THE SUPREME COURT'S DECISION IN ADARAND DOES NOT APPLY TO GENDER-BASED POLICIES

The *Adarand* decision does not change the standard of review for gender-based policies. As Justice Stevens noted in his *Adarand* dissent, after *Adarand*, courts must apply intermediate scrutiny to cases of invidious gender discrimination while applying strict scrutiny to similar cases of race discrimination.³ The same standards of review apply to benign gender and race-based policies.

In its comments, AWRP provided a wealth of data on the economic and discriminatory barriers that women face in entering the mass media business. These barriers are appropriately remedied by specific policies targeted to increasing the level of female ownership of mass media facilities. As AWRP demonstrated in its comments, existing case law supports the conclusion that promoting economic opportunity for women is an important

³ *Id.* at *85 (Justice Stevens dissenting and noting the different standard of review of gender and race discrimination after *Adarand*).

government interest. This government interest has been recognized by the courts as sufficient to survive intermediate scrutiny. See *Califano v. Webster*, 430 U.S. 313, 317 (1977) (reducing the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as an important government objective); *Associated General Contractors v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987) (remedying disadvantages women face in marketplace is an important governmental interest); *Coral Construction, Inc. v. King County*, 941 F.2d 910, 932 (9th Cir. 1991) (the county "has a legitimate and important interest in remedying the many disadvantages that confront women business owners").

The D.C. Circuit's decision in *Lamprecht v. FCC*⁴ also is not fatal to adoption of the Commission's proposed policies targeted to increasing female ownership of mass media facilities. Significantly, *Lamprecht* was based on the court's evidentiary conclusion that a nexus had not been established between female ownership of mass media facilities and "women's programming". This evidentiary conclusion does not preclude development of such a record or a record showing a related diversity nexus nor does it preclude the adoption of policies to redress discrimination against women. With an appropriate study of the data, the Commission can develop the record to support the female ownership

⁴ 958 F.2d 382, 395 (D.C. Cir. 1992).

policies proposed in the Notice and to withstand constitutional challenge.

II. THE COMMISSION CAN ADOPT POLICIES NARROWLY TAILORED TO SERVE THE COMPELLING NEED OF REDRESSING DISCRIMINATION AGAINST WOMEN

The Supreme Court's decision in *Adarand* does not preclude the adoption of gender or race conscious policies even under a standard of review of strict scrutiny. The decision merely requires that the Commission proceed to conduct a thorough examination of the prevailing treatment of women and minorities in the industry and then determine whether those findings support narrowly tailored policies that address the compelling need to eradicate or redress discrimination against women and minorities in the industry.⁵ AWRT believes the Commission has the tools to perform such an examination of the industry and to develop appropriate policies based on its findings.

Since 1991, AWRT has requested that the Commission collect data on the gender of mass media licensees and conduct a study of the level of ownership of communications establishments by women. Most recently, on May 2, 1995, AWRT submitted a formal request to Chairman Hundt and Assistant Commerce Secretary Larry Irving of the National Telecommunications and Information Administration

⁵ Although gender-based policies are subject to intermediate scrutiny under current law, AWRT urges the Commission to develop the record to support a review of these policies under both intermediate and strict scrutiny.

outlining the scope of such a study.⁶ AWRT also supports amendment of the FCC's Annual Ownership Report Form 323 to include a designation of the gender and race of owners.⁷ The need for such a study is heightened by the continued questioning of the basis for federal policies to redress gender and race discrimination.

The absence of a study or recent data on female ownership of mass media facilities should not be taken as a sign that discrimination has evaporated from the mass media industry. AWRT diligently has sought to identify women-owned stations and mass media facilities without much success. Unfortunately, the lack of data lead AWRT to conclude that women owners are hard to find because they are in scarce supply. In addition, other than AWRT, there are no readily identifiable sponsors of women-owned businesses in mass media, such as Specialized Small Business Investment Companies or NABOB, that finance or represent women-owners. The Commission's proposed initiatives should not be

⁶ See AWRT Comments at Ex. 1.

⁷ AWRT applauds the Commission for its decision to continue to collect data on female ownership of bidders participating in the upcoming C block broadband PCS auction. See *Further Notice of Proposed Rulemaking, In the Matter of Implementation of Section 309(j) of the Communications Act-Competitive Bidding, Amendment of the Commission's Cellular-PCS Cross Ownership Rule, Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, PP Docket No. 93-253, GN Docket No. 90-314, GN Docket No. 93-252 at ¶ 17 ("*PCS Further Notice of Proposed Rulemaking*"). The data collected from the auction will provide the Commission with valuable and heretofore unavailable information on female participation in the industry.

discarded as a hasty response to the Supreme Court's decision without further study.⁸

The data on business ownership by women and the available statistics on female ownership of mass media facilities demonstrate the need for further study. As the evidence provided in AWRT's comments demonstrates, the glass ceiling women face in obtaining positions of corporate governance and the barriers women confront in accessing capital are gender-based not performance-based. The 1987 census revealed that women owned and controlled only 1.9% of all television stations. Only 3.8% of radio stations were owned and controlled by women at the time of the census. Although women-owned businesses frequently use banks as a source of capital, fully two-thirds of women business owners report difficulties in working with financial institutions. One-third of women business owners perceive some degree of gender-based discrimination in seeking financing from financial institutions. In addition, in 1993, less than 1% of the \$3 billion invested by venture capitalists was received by women-owned businesses. These statistics demonstrate that gender discrimination has played a prominent role in keeping women outside the ownership ranks of mass media facilities. The

⁸ When AWRT filed its comments, it expected the most recent census data quantifying the number of women business owners of mass media facilities to be available this month. See AWRT Comments at n.3. Census representatives now anticipate that the report will not be released until September, 1995. At a minimum, the Commission should not abandon the initiatives for women proposed in the Notice until the Census report is released and the data are analyzed.

Commission should not ignore this data but should search further to firmly analyze the roots and pervasiveness of this discrimination.

AWRT demonstrated in its comments the compelling need for Commission policies that redress the discriminatory barriers that women face in entering the mass media industry. AWRT encourages the Commission to carefully analyze the reality confronted by women seeking to own mass media facilities before concluding this proceeding. As Commissioner Barrett so poignantly noted in his thoughtful statement following *Adarand*, "if the government does not take the responsibility to create fundamentally fair opportunities for minorities and women (particularly for those that have experience and financial ability), to address and to ultimately redress acts of ongoing discrimination, these groups will never overcome the inherited obstacles that are the basis for their continued lack of opportunities."⁹ AWRT firmly believes that the record will demonstrate a compelling need to address discrimination against women by adopting the narrowly tailored policies proposed by the Commission in the Notice.

WHEREFORE, AWRT encourages the Commission to: (1) collect data on ownership by women; (2) conduct a study on the level of women-owned communications companies and the reasons for their scarcity; and (3) develop narrowly tailored policies, such as the incubator program, to serve the compelling government need of

⁹ Statement of Commissioner Andrew C. Barrett, *PCS Further Notice or Proposed Rulemaking*, PP Docket 93-253 at 3 (June 27, 1995).

reducing discrimination against women entering the mass media industry.

Respectfully submitted,

AMERICAN WOMEN IN RADIO &
TELEVISION, INC.


Shelley L. Spencer

Vice President Government Relations
American Women In Radio &
Television, Inc.
c/o Swidler & Berlin, Chtd.
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007
(202) 424-7798

Dated: July 10, 1995